IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

PLANNED PARENTHOOD OF ALASKA, and SUSAN WINGROVE, Plaintiffs, vs. CRAIG CAMPBELL, in his capacity as Acting Lieutenant Governor of the State of Alaska, Defendant.	)	Case No. 3AN-09-09236 CI

DECISION AND ORDER

I. INTRODUCTION

Planned Parenthood of Alaska has mounted a pre-election constitutional challenge to a parental notification initiative that would require a doctor to notify parents of their minor daughter's intent to obtain an abortion. The PNI is an overlay of a prior parental consent act that was declared unconstitutional by the Alaska Supreme Court. As an overlay of the PCA, the PNI provides for a judicial bypass procedure as an alternative to parental notification. The court concludes that PPA's complaint for declarative and injunctive relief is ripe; that the PNI's validation of the PCA is not clearly unconstitutional; that the PNI is understandable by voters; that the PNI unconstitutionally prescribes a limited number of court rules; that the court can sever the offending court prescriptions

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from the rest of the PNI; and that the summary of the PNI certified by the lieutenant governor is not impartial and accurate but that the summary can be corrected by the lieutenant governor for the ballot and the election pamphlet.

II. FACTS AND PROCEEDINGS

On May 6, 2009, then lieutenant governor Sean Parnell received 09PIMA, an application for an initiative that was entitled "The Parental Involvement Initiative, an Act Relating to Parental Involvement for a Minor's Abortion." The sponsors of the initiative were Loren Leman, Kim Hummer-Minnery, and Mia Costello, who are intervenors in the present litigation.[1]

The Sponsors presented the initiative largely as an amendment to the 1997 Parental Consent Act,[2] which the Alaska Supreme Court declared to be a violation of the Alaska Constitution's right of privacy.[3] For the initiative, the Sponsors used a legislative drafting style where additions to the PCA were underlined and bolded and deleted provisions were put in brackets. In substance, the PNI provided for

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[1] The intervenors are referred to herein as "the sponsors."

[2] AS 18.16.010(a)(3) and (g) and AS 18.16.020-.030. The initiative also adds a new section, AS 18.16.040.

[3] *State of Alaska v. Planned Parenthood of Alaska*, 171 P.3d 577, 585 (Alaska 2007)(*Planned Parenthood II*). In *State v. Planned Parenthood of Alaska*, 35 P.3d 30 (Alaska 2001)(*Planned Parenthood I*), the Alaska Supreme Court determined that minors and adults have a constitutional right to privacy relative to an abortion decision and that the state can constrain a minor's privacy right only when necessary to further a compelling state interest and only if no less restrictive means exist to advance that interest.

notification by a doctor to the parents of a minor's intent to have an abortion. However, the PNI also modified the time frames set forth in the PCA for filing a judicial bypass action in court and in appealing the superior court decision to the supreme court.[4] A copy of the initiative is attached hereto as Exhibit A.

On July 2, 2009, after receiving advice from the attorney general's office, lieutenant governor Parnell certified the initiative application under Article XI of the Alaska Constitution and under the provisions of AS 15.45. The lieutenant governor found that the proposed initiative was in the proper form, that the application was substantially in the required form, and that there were a sufficient number of qualified sponsors of the initiative.

The attorney general's office prepared what it described as an impartial summary of the initiative for the petition booklets. The lieutenant governor approved the summary which provides as follows:

> Abortion for minor requires notice to or consent from parent or guardian or judicial bypass
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> This bill would require notice to the parent or guardian of a female under the age of 18 before she has an abortion. Notice must be received at least 48 hours before the procedure. This waiting period would be waived if a parent or guardian gives consent.

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[4] For example, the PCA requirement of a hearing after the filing of a complaint was shortened from five business days to three. AS 18.16.030(c). On an appeal of the superior court decision relative to the minor's request for an abortion without parental notification or consent, the time for the superior court to deliver a copy of the notice of appeal and the record on appeal was shortened from four days to three. AS 18.16.030(j). The time for the appellant to file a brief was shortened from four days to three after the appeal was docketed. *Id.*

> The bill also allows the minor to go to court to authorize an abortion without giving notice to her parent or guardian. The minor could ask the court to excuse her from school to attend the hearings and to have the abortion. The court could direct the school not to tell the minor's parent or guardian of the minor's pregnancy, abortion, or absence from school.
>
> The bill allows a minor who is a victim of abuse by her parent or guardian to get an abortion without notice or consent. To do this, the minor and an adult relative or authorized official with personal knowledge of the abuse must sign a notarized statement about the abuse.
>
> The bill sets out a doctor's defense for performing an abortion without first providing notice or obtaining consent where the minor faces an immediate threat of death or permanent physical harm from continuing the pregnancy. Doctors who perform abortions on a minor would have to submit reports.
>
> Should this initiative become law?

One week after the PNI was certified by the lieutenant governor, PPA and Susan Wingrove[5] filed their complaint for declaratory and injunctive relief against Craig Campbell, who by the time of the filing of the complaint had become the acting lieutenant governor, to obtain a pre-election determination that the PNI violates Article XI, Sections 2 and 7 of the Alaska Constitution and various provisions of AS 15.45; an injunction that the PNI not be placed on a statewide election ballot; and in the alternative, a remand to the lieutenant governor to prepare a summary that is impartial and comprehensible. Thereafter PPA filed a motion for preliminary injunction relative to the PNI. The parties agreed to

convert PPA's motion for preliminary injunction into a motion for summary judgment. The sponsors and the lieutenant governor opposed PPA's motion for summary judgment and cross-moved for summary judgment. The briefing on the various summary judgment motions was completed on November 3, 2009. The court heard oral argument on the motion practice on February 24, 2010. This decision and order constitutes the court's rulings on the various summary judgment motions.

III. APPLICABLE LEGAL STANDARDS

Alaska R. Civ. P. 56 is the appropriate mechanism to resolve cases where there are no genuine issues of material facts and a party is entitled to judgment as a matter of law. The one, and perhaps only, thing that the parties agree on in this case is that there are no genuine issues of material fact. The parties' disagreements center on who is entitled to summary judgment and why.

IV. DISCUSSION

A. PPA's claim is ripe.

The sponsors claim that this dispute is not ripe because they may never obtain the requisite number of signatures on their initiative petition. Thus the sponsors claim that PPA is asking for an advisory opinion on an issue that may never be presented to the voters on the ballot.

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[5] Plaintiffs are referred to herein as PPA.

The ripeness doctrine requires a plaintiff to claim that either a legal injury has been suffered or that one will be suffered in the future.[6] The general principles for ripeness are (1) the case should not involve "uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all,"[7] (2) the issues in the case should be fit for judicial decision, and (3) the court should give special attention to the "hardship to the parties of withholding court consideration."[8]

The sponsors' ripeness argument is not well taken for two principal reasons. First, Alaska statutory law makes PPA's claim ripe. AS 15.45.240 provides:

> Any person aggrieved by a determination made by the lieutenant governor under AS 15.45.010 – 15.45.220 may bring an action in the superior court to have the determination reviewed within 30 days of the date of which notice of the determination was given.

The Alaska Supreme Court has interpreted a prior version of AS 15.45.240 to mean that this provision sets a statute of limitations of 30 days to challenge a

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[6] *See, e.g., Brause v. Bureau of Vital Statistics*, 21 P.23d 357, 359 (Alaska 2001).

[7] *Id.* (quoting 13 Charles Alan Wright, et al., Federal Practice and Procedure § 3532 at 112 (2d ed. 1984)).

[8] *Id.*

determination made by the lieutenant governor.[9] Thus, PPA had no choice but to file a prompt challenge to the initiative if it were ever going to do so.

Second, time has marched on since the sponsors made their ripeness argument. At oral argument, counsel for the sponsors acknowledged that they had obtained the requisite signatures for placing the initiative on the 2010 general election ballot and had presented those signatures to the lieutenant governor for certification.[10] Certainly, with the present prospect that the PNI will be on the November, 2010, ballot, PPA's challenge to the initiate is timely.

B. The PNI's validation of the PCA is not clearly unconstitutional.

The Alaska Constitution gives the people the power to propose and enact laws by initiative.[11] The usual rule is for the courts to construe voter initiatives broadly so as to preserve them whenever possible.[12] Pre-election review of

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[9] *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 85 (Alaska 1988).

[10] In order for an initiative petition to be filed with the lieutenant governor, it must be signed by qualified voters who are equal in number to at least ten percent of those who voted in the preceding general election, who are resident in at least three-fourths of the house districts of the State, and who, in each of those house districts, are equal in number to at least seven percent of those who voted in the preceding general election in the house district. Alaska Const. art. XI, § 3; AS 15.45.140. The sponsors claim that the total number of signatures required for the petition to be submitted to the lieutenant governor is 32,734.

[11] Alaska Const. art. XI, § 1.

[12] *See Pullen v. Ulmer*, 923 P.2d 54, 58 (Alaska 1996); *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985).

initiatives by the courts is limited to ascertaining whether the initiative complies with the particular constitutional and statutory provisions regulating initiatives.[13] Thus, at the present pre-election stage, the court does not engage in a full blown constitutional analysis of the proposed initiative as may later occur if the initiative becomes law.

One of the PPA constitutional claims that must be saved for a later day is whether an initiative can validate a law that has previously been declared unconstitutional. In *Planned Parenthood II*,[14] the Alaska Supreme Court ruled that the PCA impermissibly infringed on a minor's fundamental right to privacy[15] when deciding whether to terminate a pregnancy because there was a less restrictive means (parental notification) to advance the state's compelling interest in protecting the health of minors and in fostering family involvement in a minor's decision regarding her pregnancy.[16] The PNI is an attempt to revalidate the PCA with a parental notice make over in order to meet the less restrictive means concern of the Alaska Supreme Court.

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[13] *See Trust the People v. State*, 113 P.2d 613, 625-26 (Alaska 2005), and *Brooks v. Wright*, 971 P.2d 1025, 1027 (Alaska 1999).

[14] 171 P.3d 577 (Alaska 2007).

[15] Alaska Const. art. I, § 22 provides that the right of the people to privacy is recognized and shall not be infringed.

[16] *Id.* at 579.

PPA claims that an unconstitutional statute is null and void and can never be revisited. PPA says that the sponsors should have prepared an initiative that contains all of the provisions of the proposed new law rather than overlay the curative provisions on an unconstitutional statute. None of the parties has cited the court to a case anywhere in the country where an unconstitutional statute was revalidated through an initiative. However, almost all jurisdictions that have considered the issue have ruled that an unconstitutional act can be revalidated by a curative amendment.[17] The leading authority on statutory construction concurs

[17] *Beck v. Beck*, 814 S.W.2d 745 (Tex. 1991)(holding that the legislature can validate an invalidated statute by passing a constitutional amendment to cure it); *Ex Parte Hensley*, 285 S.W.2d 720 (Tex. Crim. App. 1956)(holding that by amending a totally unconstitutional statute by replacing its objectionable features, the legislature had validated it); *Smith v. State Bd. of Medical Exam'r*, 157 S.E. 268 (Ga. 1931)(holding that 1918 act providing for a hearing before a medical license could be revoked served to cure the unconstitutional 1913 act, which was "not void on the ground, as contended, that the entire section was a nullity and could not support an amendment."); *State v. Silver Bow Refining Co.*, 252 P. 301 (Mont. 1926)(holing that amendment to correct defects in the unconstitutional act of the legislature is a valid enactment); *Commonwealth ex rel. City of Richmond v. Chesapeake & O. Ry. Co.*, 87 S.E. 622 (Va. 1916)(holding that the legislature could cure the defects of an unconstitutional law by amending it to remove the objectionable provisions); *State v. Corker*, 72 A. 262 (N.J. Err. & App. 1902)("An unconstitutional statute is not merely blank paper. The solemn act of the legislature is a fact to be reckoned with. Nowhere has power been vested to expunge it or remove it from its proper place among statutes."); *Ferry v. Campbell*, 81 N.W. 604, 608 (Iowa 1900)("the Amendatory act simply removed an impediment to the enforcement of the tax, and, when that impediment was removed, the original act was effectual, and capable of enforcement by proceedings had under the new act."); *State v. City of Cincinnati*, 40 N.E. 508, 510 (Ohio 1985)("[A]n unconstitutional statute may be amended into a constitutional one, so far as its future operation is concerned, by removing its objectionable provisions, or supplying others to conform it to the requirements of the

with his majority view.[18] The court does not perceive any fundamental difference between an initiative and a legislative enactment when it comes to revalidating an unconstitutional law.[19] Both achieve the same goal, a binding legal enactment. At least from the perspective of this pre-election challenge to the initiative, there is nothing so inimical to the methodology of the sponsors as to render that methodology clearly unconstitutional.

C. The PNI is understandable.

There are few requirements for the form of an initiative. Pursuant to AS 15.45.040, (1) the bill shall be confined to one subject; (2) the subject of the bill shall be expressed in the title; (3) the enacting clause of the bill shall be: "Be it enacted by the People of the State of Alaska;" and (4) the bill may not include subjects restricted by AS 15.45.010. The restrictive provisions in AS 15.45.010 mirror the restrictions set forth in Article XI, Section 7 of the Alaska

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constitution."); *Walsh v. State*, 41 N.E. 65 (Ind. 1995) holding that amendment of an unconstitutional statute may be made by a subsequent legislature and thereby remedy the constitutional objections); *Jacksonville, T. & K. Ry. Co. v. Adams*, 15 So. 257 (Fla. 1894)(holding that statute that was invalidated by subsequent constitutional provision was amenable to amendment to conform to the constitution). *Contra Keane v. Remy*, 168 N.E. 10 (Ind. 1929).

[18] 1A Sutherland on Statutes and Statutory Construction 22:4 (7th ed. 2009).

[19] Alaska Const. art. XII, § 11 provides that unless clearly inapplicable, the law-making powers assigned to the legislature may be exercised by the people through the initiative subject to the limitations of Article XI.

Constitution.[20] Pursuant to these provisions, the initiative cannot, among other things, prescribe court rules. The PNI meets the first three requirements of AS 15.45.040. The prescription of court rules is not a fatal flaw in the initiative because the minimal portion of the initiative that prescribes court rules can be severed from the remainder of the initiative.

Despite the great leeway provided to an initiative, PPA claims that the PNI is incomprehensible and misleading for a variety of reasons. PPA's arguments are either not well founded or can be ameliorated by a properly drafted summary.

PPA argues that the PNI does not advise voters that the proposed notice provisions are a restriction on current law, which does not require parental notification before a minor's abortion, and that the PCA that the PNI seeks to amend has been declared unconstitutional by the Alaska Supreme Court. PPA's argument is misdirected. It cites to cases involving Anchorage municipal elections that, at the time, permitted sponsors and election officials to inform voters about the initiative within the text of the bill.[21]

State law is different than the former Municipality of Anchorage election law. Statewide, voters are presented with the details of the initiative through a

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[20] *See* § D below.

[21] *Citizens for Implementing Medical Marijuana v. Municipality of Anchorage*, 129 P.3d 898 Alaska 2006), and *Faibeas v. Municipality of Anchorage*, 860 P.2d 1214 (Alaska 1983).

summary, which appears in the petitions the voters sign,[22] in the election pamphlet,[23] and on the ballot.[24] The lieutenant governor has an obligation to provide an impartial summary of the PNI for voters.[25] A properly drafted summary should advise voters that the PNI is a restriction on current law. Likewise, the prior ruling that the PCA was found by the Alaska Supreme Court to be an unconstitutional violation of a minor's right to privacy should be disclosed to voters in the summary of the PNI. However, as indicated above, the effort of the sponsors to revalidate the PCA, including provisions of the PCA not referenced in the PNI, through the PNI is not a clearly unconstitutional act. The PNI's modification of the PCA does not cause undue confusion.[26]

PPA asserts that the PNI is misleading because it does not inform voters that physicians will be subject to criminal prosecution if they do not follow the strict notice provisions of the PNI.[27] Again this argument is diffused by the

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[22] AS 15.45.090(a)(2).

[23] AS 15.58.020(6)(B).

[24] AS 15.45.180.

[25] AS 15.45.090(a)(2).

[26] Voters will obtain additional information about the initiative in the election pamphlet that will include the summary, the full text of the proposition, a neutral summary prepared by the Legislative Affairs Agency, and statements submitted that advocate voter approval or rejection of the proposition. AS 15.58.020(a)(6).

[27] The criminal sanctions are set forth in AS 18.16.010(c), which is not part of the initiative and which was enacted prior to the PCA. This statute states: "A person

impartial summary of the PNI from the lieutenant governor. The PNI does not contain the criminal provisions for violation of the PNI's notice provisions. However, voters should know the effects of the initiative that they are voting for. Those effects should be set forth in the summary not in the initiative.

PPA postulates that the PNI is confusing by the legislative drafting style of the sponsors in the PNI. The sponsors borrowed a legislative approved technique of bolding and underlining additions to the PCA and bracketing deletions.[28] The sponsors' drafting style fairly apprises voters on what they are voting for or against. In this day and age of ubiquitous word processing software that has a redlining feature where additions are underlined and deletions are struck through or moved to the margin, the average voter will not be flummoxed by a similar modification methodology in the PNI.

The sponsors were not perfect scriveners. They made mistakes in drafting the PNI. PPA points to those mistakes as a basis for invalidating the PNI. For example, the PNI raises the age bar from "under 17" used in the PCA for those required to obtain parental consent to an abortion to "under 18" for those required

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who knowingly violates a provision of this section [18.16.010], upon conviction, is punishable by a fine of not more than $1,000 or by imprisonment for not more than five years, or by both." The strict notice provisions of the PNI are included in AS 18.16.020(b). For example, notice by telephone from the physician to the minor's parents must be attempted by the physician's designee for not less than five attempts in not less than two-hour increments in a 24-hour period.

[28] *Manual of Legislative Drafting* at 85-6 (Legislative Affairs Agency 2009).

to obtain parental notification before obtaining an abortion unless, of course, the judicial bypass option is used. Yet, in three places in the PNI, the age figure of 18 is inserted without a bold and underlined identifier that there is an age modification from the figure of 17 in the PCA.[29]

The sponsors' mistakes relative to the age changes are not critical to the validity of the PNI. Elsewhere in the PNI, the sponsors correctly show that there has been an age change from "under 17" to "under 18."[30] Besides, the sponsors clearly provide in a consistent fashion in the text of the PNI that the PNI applies to minors "under 18." Voters will not be misled by the age enumeration in the text of the PNI. The court's conclusion is consistent with Alaska's articulated policy to construe initiatives broadly so that the will of the people can be expressed through the initiative process.[31]

Finally, PPA asserts that the PNI should be invalidated because the sponsors included AS 18.16.010(a)(2) and (4), which the attorney general concluded were unconstitutional in an attorney general opinion in 1981.[32] While it

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[29] *See* Ex. A for the proposed amendments to AS 18.16.010(a)(3), AS 018.16.030(a), and AS 18.16.030(b)(2).

[30] *Id.* for the repeal and reenactment of AS 18.16.020(a).

[31] *See* n.12 *supra*.

[32] *See* 1981 Inf. Op. Att'y Gen. (October 7; J-66-816-81). AS 18.16.010(a)(2) requires that the abortion must be performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services or a hospital operated by the federal government or an agency of the federal

would have been better for the sponsors to have deleted AS 18.16.010(a)(2) and (4) from the initiative, the inclusion is not fatal. The cited sections are a minor part of the PNI. These sections will simply have no operative effect if the PNI is ultimately approved by the voters. Again, consistent with the liberal policy of construing initiatives broadly so that the will of the people can be submitted to the voters,[33] the PNI is not fatally flawed with the inclusion of two minor provisions that are constitutionally suspect.

D. The PNI unconstitutionally prescribes court rules.

Article XI, Section 7 of the Alaska Constitution states in relevant part that: "The **initiative shall not be used to** dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or **prescribe their rules**, or enact local or special legislation." PPA argues in broad brush fashion that the PNI's use of the PCA judicial bypass option is an unconstitutional prescription of court rules and procedures under Article XI, Section 7 of the Alaska Constitution. More specifically, PPA claims that the tinkering with court deadlines in AS 18.160.030(c) and (j) for the trial court holding a hearing on and

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government. AS 18.16.010(a)(4) requires that the woman be domiciled or physically present in the state for 30 days before the abortions. The attorney general concluded that the former provision violated *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), because it applied to the first trimester of pregnancy. The attorney general concluded that latter section was of doubtful validity because a state cannot limit the availability of medical care to its own residents as opposed to recent arrivals within the state. *Doe v. Bolton*, *supra*.

deciding the minor's judicial bypass request for an abortion and for appealing the trial court's decision runs afoul of Article XI, Section 7. PPA's broad brush argument is not decisive; however, the sponsors' modification of specific court deadlines in AS 18.16.030(c) and (j) is troublesome as a potential violation of Article XI, Section 7.

While PPA argues that initiatives cannot prescribe court rules under any circumstances in light of the language of Article XI, Section 7 of the Alaska Constitution, the lieutenant governor and the sponsors take a more expansive view of the initiative power.[34] The lieutenant governor and the sponsors argue that the prohibition in Article XI, Section 7 should be limited to initiatives that are utilized for the purpose of prescribing court rules, as opposed to initiatives that are used to enact substantive law with only an incidental impact on court rules. In evaluating the constitutionality of the PNI, the lieutenant governor and the sponsors urge the court to utilize the substantial law versus procedural law distinction used by the Alaska Supreme Court in determining whether a legislative enactment impinges

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[33] *See* n.12 *supra*.

[34] Both parties cite to *Citizens Coalition for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162 (Alaska 1991)(an effort to limit contingent fees in a tort reform initiative was found to be an attempt to prescribe a court rule in violation of Article XI, § 7).

on the court's rule making authority pursuant to Article IV, Section 15 of the Alaska Constitution.[35]

The Alaska Supreme Court has not yet provided this court with a measuring tool for how expansively or narrowly Article XI, Section 7 should be interpreted in the context of the present challenge to the PNI. This court does not believe that it has to choose between the competing positions of the parties because of the unique facts of this case.

The legislature has the constitutional power to modify court rules through a two thirds vote of the members elected to each house.[36] The legislature passed the PCA in 1997 by a two thirds majority.[37] The PCA included a judicial bypass option to parental consent. Without the judicial bypass option, the PCA would not

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[35] The Alaska Supreme Court has said that as a general rule, "substantive law creates, defines and regulates rights, while procedural law prescribes the method of enforcing the rights." *Ware v. City of Anchorage*, 439 P.2d 793, 794 (Alaska 1968). In *Nolan v. Sea Airmotive, Inc.*, 627 P.2d 1035, 1042 (Alaska 1981), the court revisited the substance and procedure dichotomy and described the requirements that had to be met in order to invalidate a statute as procedural. Courts must conclude first that the statute indeed conflicts with a rule promulgated by the court; second, that the main subject of the statute is not substantive with only an incidental effect on procedure; and finally, that the legislature has not changed the rule with the stated intent of doing so. *State v. Native Village of Nunapitchuk*, 156 P.3d 389, 396-7 (Alaska 2007).

[36] Alaska Const. art. IV, § 15.

[37] Alaska House Journal, 20th Leg., 1st Reg. Sess. (April 17, 1997); Alaska Senate Journal, 20th Leg., 1st Reg. Sess. April 18, 1997).

have met federal constitutional concerns relative to a minor's right to privacy.[38] Thus, the substantive PCA could not have existed without a judicial bypass option that clearly affects court rules and procedures.

The attempt of the PNI to revitalize the PCA including the judicial bypass option is not a violation of Article XI, Section 7 of the Alaska Constitution because the bypass option was passed by a super majority of the legislature. The PNI is simply riding the constitutional coattails of the 1997 legislative action in implementing a judicial bypass option. As noted above, the revalidation of the PCI through the PNI is not clearly unconstitutional.

The sponsors' tinkering with the specific deadlines in the judicial bypass option is problematic. The sponsors and the lieutenant governor urge the court to adopt a substance/procedure dichotomy that the Alaska Supreme Court has applied to legislative enactments, without a super majority vote, such that enactments with an incidental effect on court rules are acceptable. Even if this court were to adopt the substance/procedure dichotomy, that rule of law would not justify the specific date tinkering engaged in by the sponsors in their modifications of AS 18.16.030(c) and (j) because those date changes were not incidental or unintentional and were meant to affect court rules. In determining that the court deadline date changes in the PNI's modifications AS 18.16.030(c) and (j) violate Article XI, Section 7, the court is mindful of what is actually going on by the date

[38] *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979).

changes. Originally, the PCA provided for a hearing after the filing of a complaint in five business days.[39] On an appeal of the superior court decision relative to the minor's request for an abortion without parental consent, the time for the superior court to deliver a copy of the notice of appeal and the record on appeal was four days.[40] The time for the appellant to file a brief was four days after the appeal was docketed.[41]

After the enactment of the PCA in 1997, the Alaska Supreme Court changed many of the above deadlines by adopting Supreme Court Oder 1279 on July 31, 1997, as part of the court's rule making authority.[42] The supreme court order established Alaska R. Probate 20 and Alaska R. App. P. 220. Under the supreme court's rule making authority the operative time for many actions was shortened to "48 hours."[43] Thus by changing the specific deadlines in AS

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[39] AS 18.16.030(c).

[40] *Id.*

[41] AS 18.16.030(j).

[42] Alaska Const. art. IV, § 15 provides that the supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts.

[43] Under Alaska Probate R. 20(d), the time for scheduling a hearing after receipt of a judicial bypass petition is 48 hours. Under Alaska R. App. P. 220(d), in the event of an appeal of a judicial bypass judgment, the clerk of the trial court must transmit the record on appeal to the appellate court so that the record arrives in the appellate court within 48 hours after the notice of appeal is filed.

18.16.030(c) and (j), the sponsors are actually subverting the shorter timeframes established specifically by the Alaska Supreme Court. This time tinkering by the sponsors in the initiative is a violation of Article XI, Section 7 of the Alaska Constitution.

E. The offensive prescriptions of court rules can be severed from the PNI.

The lieutenant governor argues alternatively that if there is a violation of Article XI, Section 7 and AS 15.45.010, the offending sections of the PNI should be severed and the remainder of the initiative should be allowed to proceed to a vote of the people. In order to promote the important right of the people to enact laws by initiative, the Alaska Supreme Court has authorized trial courts to sever impermissible portions of a proposed bill when the following conditions are met: (1) standing alone, the remainder of the proposed bill can be given legal effect; (2) deleting the impermissible portion would not substantially change the spirit of the measure; and (3) it is evident from the content of the measure and the circumstances surrounding its proposal that the sponsors and subscribers would prefer the measure to stand as altered, rather than to be invalidated in its entirety.[44]

The court finds that the offending sections are not critical to the initiative, that they can easily be severed without substantially changing the spirit of the initiative, and that the sponsors and subscribers would want the initiative to

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[44] *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 93-95 (Alaska 1988).

proceed as modified. The offending sections consist of four words.[45] The main intent of the PNI is to establish a parental notification option before a minor has an abortion. The abbreviated number of days for litigation events to occur when the minor exercises the judicial bypass option is not a central component of the PNI. In their briefing, the sponsors do not object to the concept of severance that has been raised by the lieutenant governor as an alternative to invalidating the entire PNI. Accordingly, the court severs the day change amendments proposed in AS 18.16.30(c) and (j) from the remainder of the PNI. The day change amendments[46] may not be part of the PNI submitted to the voters.

F. The initiative summary is not impartial and accurate but it can be revised by the lieutenant governor for the ballot and the election pamphlet.

The purpose of the ballot summary required by AS 15.45.090(a)(2) "is to enable voters to reach informed and intelligent decisions on how to cast their

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[45] The four words are "third" as used twice in the context of having a hearing on a complaint by the third business day following the filing of a judicial bypass complaint; "three" in the context of the notice of appeal and the record on appeal being delivered to the supreme court within three business days after the notice of appeal is filed; and "three" in the context of the number of days in which a brief should be filed after an appeal is docketed relative to a judgment on a judicial bypass claim. AS 18.16.030(c) and (j).

[46] *See* n.45. *supra*.

ballots."[47] The court applies a "deferential standard of review."[48] This means that the trial court should not invalidate a summary simply because it believes a better one could be written; rather the lieutenant governor's summary will be upheld unless the court cannot reasonably conclude that the summary is impartial and accurate.[49] The burden is placed on those attacking the summary to show that it is biased or misleading.[50]

The Alaska Supreme Court has said that a summary of an initiative must be complete enough to convey an intelligible idea of the scope and import of the proposed law and ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy, and it must contain no partisan coloring.[51] The critical point is that summaries can be inaccurate from omission as well as commission. The problem in this case is not what the lieutenant governor said; it is what he didn't say. The court cannot reasonably conclude that the summary is accurate and impartial given the omissions from it. In order for the voters to have

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[47] *Alaskans for Efficient Government, Inc. v. State*, 52 P.3d 732, 735-36 (Alaska 2002).

[48] *Burgess v. Alaska Lieutenant Governor*, 654 P.2d 273, 276 (Alaska 1982).

[49] *Alaskans for Efficient Government, Inc. v. State*, 52 P.3d 732, 735 (Alaska 2002).

[50] *Id.*

[51] *Id.*

a level playing field on the decision of whether to vote in favor of or against the PNI, voters should know, but do not know, from the summary the following:

1. The PNI would restrict current law, which does not require parental notification before a minor obtains an abortion.
2. The PNI modifies and revalidates the PCA, a prior legislative enactment that the Alaska Supreme Court found to be unconstitutional because it did not provide the least restrictive means available to impact the minor's fundamental right to privacy. The PNI modifies the PCA by providing for parental notification, the least restrictive means available that meets the state's compelling interest in protecting the health of the minor and in fostering family involvement in a minor's decision regarding her pregnancy.
3. If adopted, the PNI would implicate other laws that make it a criminal offense (a felony with imprisonment for up to five years) for a physician to knowingly violate the statutory notification provisions for giving the minor's parents notice of the minor's intent to have an abortion.

The court enjoins the use of the current summary prepared by the lieutenant governor for the PNI. The court remands this matter to the lieutenant governor to

develop a fair and accurate summary that is consistent with the court's requirements noted above.[52]

The court is not unmindful of the potential effects of its decision on the delay in presenting the PNI to the voters because of the inaccurate summary and the effort that would be required if the sponsors had to go back to square one and re-solicit petitions to obtain the necessary signatures utilizing the correct summary. The lieutenant governor has suggested a suitable alternative for dealing with the situation. The lieutenant governor shall prepare a revised summary as it should appear on the ballot and in the election pamphlet. The objectionable summary was not so misleading as to require resubmission of the initiative to enough voters to get the initiative on the ballot. This result comports with the Alaska Supreme Court's liberal construction of initiatives so that the people are permitted to vote and express their will on proposed legislation.[53] Furthermore, the result ordered by the court is exactly what the Alaska Supreme Court did in

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[52] The lieutenant governor has the discretion to come up with additional language that complies with the word limitations imposed by AS 15.45.180 and meets the Flesch test score requirements of AS 15.60.005. According to the attorney general, the present summary only contains 209 words out of a maximum available word count of 450. *See* Ex. C to the complaint at 15. Thus, there should be plenty of words available to add to the summary to meet the court's concerns.

[53] *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974)(overruled on other grounds by *McAlpine v. Univ. of Alaska*, 762 P.2d 81 (Alaska 1988)).

McAlpine v. Univ. of Alaska[54] when the court severed an unconstitutional part of an initiative but did not require the sponsors to institute the certification and signature gathering processes a second time.

V. CONCLUSION

The cross-motions for summary judgment are denied in part and granted in part. Specifically, the court concludes that the date changes in AS 18.16.030(c) and (j) of the PNI are an unconstitutional violation of Article XI, Section 7 of the Alaska Constitution. Those offending dates are severed from the PNI. The remainder of the PNI is valid. The lieutenant governor is enjoined from utilizing the present summary for the PNI on the November, 2010, ballot and in the election pamphlet. The matter is remanded to the lieutenant governor to develop an accurate summary of the PNI consistent with the requirements of this opinion. The revised summary can be placed on the ballots and the election pamphlet for the next general election. The sponsors do not have to resubmit the revised summary to voters to gather new signatures on petitions to be submitted to the lieutenant governor. The lieutenant governor can certify the petitions already received using the signatures that have been provided by the sponsors.

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[54] 762 P.2d 81, 96 (Alaska 1988).

Dated this 16th day of March, 2010, at Anchorage, Alaska.

Frank A. Pfiffner
Superior Court Judge

I certify that on 03/16/10 a copy of this order was mailed/~~faxed/~~ ~~hand-delivered,~~ to counsel at their address of record.
T. Stenson A. Bryner K. Clarkson
D. Aguilar J. Grace
L. Ernstein M. Barnhill
J. Crepps S. Felix
J. Shine, Judicial Assistant

THE PARENTAL INVOLVEMENT INITIATIVE

"An Act relating to parental involvement for a minor's abortion

BE IT ENACTED BY THE PEOPLE OF THE STATE OF ALASKA:

* **Section 1.** AS 18.16.010(a) is amended to read:

(a) An abortion may not be performed in this state unless

(1) the abortion is performed by a physician licensed by the State Medical Board under AS 08.64.200;

(2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services or a hospital operated by the federal government or an agency of the federal government;

(3) before an abortion is knowingly performed or induced on **a pregnant,** [AN] unmarried, unemancipated woman under 18 years of age, **notice or** consent **have** [HAS] been given as required under AS 18.16.020 or a court has authorized the minor to proceed with the abortion **without parental involvement** under AS 18.16.030 and the minor consents; for purposes of enforcing this paragraph, there is a rebuttable presumption that a woman who is unmarried and under 18 years of age is unemancipated;

(4) the woman is domiciled or physically present in the state for 30 days before the abortion; and

(5) the applicable requirements of AS 18.16.060 have been satisfied.

* **Sec. 2.** AS 18.16.010(g) is amended to read:

(g) It is **a** [AN AFFIRMATIVE] defense to a prosecution or claim for violation of (a)(3) of this section that**, in the clinical judgment of the physician or surgeon,** compliance with the requirements of (a)(3) of this section was not possible because**, in the clinical judgment of the physician or surgeon,** an immediate threat of serious risk to the life or physical health of the pregnant minor from the continuation of the pregnancy created a medical emergency necessitating the immediate performance or inducement of an abortion. In this subsection,

(1) "clinical judgment" means a physician's or surgeon's subjective professional medical judgment exercised in good faith;

(2) "defense" has the meaning given in AS 11.81.900(b);

(3) "medical emergency" means a condition that, on the basis of the physician's or surgeon's good faith clinical judgment, so complicates the medical condition of a pregnant minor that

(A) [(1)] an immediate abortion of the minor's pregnancy is necessary to avert the minor's death; or

(B) [(2)] a delay in providing an abortion will create serious risk of **medical instability caused by a** substantial and irreversible impairment of a major bodily function of the pregnant minor.

* **Sec. 3.** AS 18.16.020 is repealed and reenacted to read:

Sec. 18.16.020. Notice or consent required before minor's abortion. (a) A person may not knowingly perform or induce an abortion upon a minor who is known to the person to be pregnant, unmarried, under [17] **18** years of age, and unemancipated unless, before the abortion, at least one of the following applies:

(1) (A) one of the minor's parents, the minor's legal guardian, or the

minor's custodian has been given notice of the planned abortion not less than 48 hours before the abortion is performed, or (B) the parent, legal guardian, or custodian has consented in writing to the performance or inducement of the abortion -- if a parent has consented to the abortion the 48 hour waiting period referenced in subsection (A) above does not apply;

(2) a court issues an order under AS 18.16.030 authorizing the minor to consent to the abortion without notice or consent of a parent, guardian, or custodian, and the minor consents to the abortion;

(3) a court, by its inaction under AS 18.16.030, constructively has authorized the minor to consent to the abortion without notice and consent of a parent, guardian, or custodian, and the minor consents to the abortion; or

(4) the minor is the victim of physical abuse, sexual abuse, or a pattern of emotional abuse committed by one or both of the minor's parents or by a legal guardian or custodian of the minor and the abuse is documented by a declaration of the abuse in a signed and notarized statement by

(A) the minor; and

(B) another person who has personal knowledge of the abuse who is

(i) the sibling of the minor who is 21 years of age or older;

(ii) a law enforcement officer;

(iii) a representative of the Department of Health and Social Services who has investigated the abuse;

(iv) a grandparent of the minor; or

(v) a stepparent of the minor.

(b) In (a)(1) of this section, actual notice must be given or attempted to be given in person or by telephone by either the physician who has referred the minor for an abortion or by the physician who intends to perform the abortion. An individual designated by the physician may initiate the notification process, but the actual notice shall be given by the physician. The physician giving notice of the abortion must document the notice or attempted notice in the minor's medical record and take reasonable steps to verify that the person to whom the notice is provided is the parent, legal guardian, or custodian of the minor seeking an abortion. Reasonable steps to provide notice must include

(1) if in person, requiring the person to show government-issued identification along with additional documentation of the person's relationship to the minor; additional documentation may include the minor's birth certificate or a court order of adoption, guardianship, or custodianship;

(2) if by telephone, initiating the call, attempting to verify through a review of published telephone directories that the number to be dialed is that of the minor's parent, legal guardian, or custodian, and asking questions of the person to verify that the person's relationship to the minor is that of parent, legal guardian, or custodian; when notice is attempted by telephone but the physician or physician's designee is unsuccessful in reaching the parent, legal guardian, or custodian, the physician's designee shall continue to initiate the call, in not less than two-hour increments, for not less than five attempts, in a 24-hour period.

(c) If actual notice is attempted unsuccessfully after reasonable steps have been taken as described under (b) of this section, the referring physician or the physician intending to perform an abortion on a minor may provide constructive notice to the minor's parent, legal guardian, or custodian. Constructive notice is considered to have been given 48 hours after the certified notice is mailed. In this subsection, "constructive notice" means that notice of the abortion was provided in writing and mailed by certified mail, delivery restricted to addressee only, to the last known address of the parent, legal guardian, or custodian after taking reasonable steps to verify the mailing address.

(d) A physician who suspects or receives a report of abuse under this section shall report the abuse as provided under AS 47.17.020.

(e) A physician who is informed that the pregnancy of a minor resulted from criminal sexual assault of the minor must retain, and take reasonable steps to preserve, the products of conception and evidence following the abortion for use by law enforcement officials in prosecuting the crime.

* **Sec. 4.** AS 18.16.030(a) is amended to read:

(a) A woman who is pregnant, unmarried, under 18 years of age, and unemancipated who wishes to have an abortion without **notice to or** the consent of a parent, guardian, or custodian may file a complaint in the superior court requesting the issuance of an order authorizing the minor to consent to the performance or inducement of an abortion without **notice to or** the consent of a parent, guardian, or custodian.

* **Sec. 5.** AS 18.16.030(b) is amended to read:

(b) The complaint shall be made under oath and must include all of the following:

(1) a statement that the complainant is pregnant;

(2) a statement that the complainant is unmarried, under 18 years of age, and unemancipated;

(3) a statement that the complainant wishes to have an abortion without **notice to or** the consent of a parent, guardian, or custodian;

(4) an allegation of either or both of the following:

(A) that the complainant is sufficiently mature and well enough informed to decide intelligently whether to have an abortion without **notice to or** the consent of a parent, guardian, or custodian; or

(B) that one or both of the minor's parents or the minor's guardian or custodian was engaged in physical abuse, sexual abuse, or a pattern of emotional abuse against the minor, or that the consent of a parent, guardian, or custodian otherwise is not in the minor's best interest;

(5) a statement as to whether the complainant has retained an attorney and, if an attorney has been retained, the name, address, and telephone number of the attorney.

* **Sec. 6.** AS 18.16.030(c) is amended to read:

(c) The court shall fix a time for a hearing on any complaint filed under (a) of this section and shall keep a record of all testimony and other oral proceedings in the action. The hearing shall be held at the earliest possible time, but not later than the **third** [FIFTH] business day after the day that the complaint is filed. The court shall

enter judgment on the complaint immediately after the hearing is concluded. If the hearing required by this subsection is not held by the **third** [FIFTH] business day after the complaint is filed, the failure to hold the hearing shall be considered to be a constructive order of the court authorizing the complainant to consent to the performance or inducement of an abortion without **notice to or** the consent of a parent, guardian, or custodian, and the complainant and any other person may rely on the constructive order to the same extent as if the court actually had issued an order under this section authorizing the complainant to consent to the performance or inducement of an abortion without such consent.

* **Sec. 7.** AS 18.16.030(j) is amended to read:

(j) If the complainant files a notice of appeal authorized under this section, the superior court shall deliver a copy of the notice of appeal and the record on appeal to the supreme court within **three** [FOUR] days after the notice of appeal is filed. Upon receipt of the notice and record, the clerk of the supreme court shall place the appeal on the docket. The appellant shall file a brief within **three** [FOUR] days after the appeal is docketed. Unless the appellant waives the right to oral argument, the supreme court shall hear oral argument within five days after the appeal is docketed. The supreme court shall enter judgment in the appeal immediately after the oral argument or, if oral argument has been waived, within five days after the appeal is docketed. Upon motion of the appellant and for good cause shown, the supreme court may shorten or extend the maximum times set out in this subsection. However, in any case, if judgment is not entered within five days after the appeal is docketed, the failure to enter the judgment shall be considered to be a constructive order of the court authorizing the appellant to consent to the performance or inducement of an abortion without **notice to or** the consent of a parent, guardian, or custodian, and the appellant and any other person may rely on the constructive order to the same extent as if the court actually had entered a judgment under this subsection authorizing the appellant to consent to the performance or inducement of an abortion without **notice to or the** consent of another person. In the interest of justice, the supreme court, in an appeal under this subsection, shall liberally modify or dispense with the formal requirements that normally apply as to the contents and form of an appellant's brief.

* **Sec. 8.** AS 18.16.030(n) is amended to read:

(n) Blank copies of the forms prescribed under (l) of this section and information on the proper procedures for filing a complaint or appeal shall be made available by the court system at the official location of each superior court, district court, and magistrate in the state. The information required under this subsection must also include notification to the minor that

(1) there is no filing fee required for either form;

(2) no court costs will be assessed against the minor for procedures under this section;

(3) an attorney will be appointed to represent the minor if the minor does not retain an attorney;

(4) the minor may request that the superior court with appropriate jurisdiction hold a telephonic hearing on the complaint so that the minor need not personally be present;

(5) the minor may request that the superior court with

appropriate jurisdiction issue an order directing the minor's school to excuse the minor from school to attend court hearings held under this section and to have the abortion if one is authorized by the court and directing the school not to notify the minor's parent, legal guardian, or custodian that the minor is pregnant, seeking an abortion, or is absent for purposes of obtaining an abortion.

* **Sec. 9.** AS 18.16 is amended by adding a new section to read:

Sec. 18.16.040. Reports. For each month in which an abortion is performed on a minor by a physician, the physician shall file a report with the Department of Health and Social Services indicating the number of abortions performed on a minor for that month, the age of each minor, the number of previous abortions performed on each minor, if any, and the number of pregnancies of each minor, if any, and the number of consents provided under each of the exceptions enumerated under AS 18.16.020(a)(1) - (4). A report filed under this section may not include identifying information of the minor other than the minor's age.